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IN THE

Supreme Court of the United States

October Term, 1955

No. 285 50

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36,

Petitioners.

vs.

J. S. GARMON, J. M. GARMON and W. A. GARMON,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

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SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36,

Petitioners.

vs.

J. S. GARMON, J. M. GARMON and W. A. GARMON,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of California entered on December 2, 1955.

Citations and Opinions Below.

The memorandum of opinion of the Superior Court of San Diego County of the State of California, a court of general jurisdiction, dated June 4, 1953, is unreported and is printed in Appendix "A" hereto, *infra,* page 1. The Judgment of the Superior Court dated July 31, 1953, is printed in Appendix "B" hereto, *infra,* page 8. The opinion of the Fourth District Court of Appeal of the State of California, printed in Appendix "C" hereto, *infra,* page 10, is unreported but found in 127 A. C. A. 2d 320. The opinion of the Supreme Court of the State of California printed in Appendix "D" hereto, *infra,* page 26 is reported in 45 A. C. 683.

Jurisdiction.

The Judgment of the Supreme Court of the State of California was entered on December 2, 1955. Appendix, page 26, *infra*. A timely Petition for Rehearing was filed and denied on December 28, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1257.

Statute Involved.

The Statutory provisions involved are the Taft-Hartley Act (Labor Management Relations Act, 1947, 29 U. S. C. 141 *et seq.*)

Questions Presented.

The conclusions of the Supreme Court of California pose the following questions:

1. May a state court under the Act, enjoin peaceful picketing of an interstate employer in a case where the Board has declined to exercise jurisdiction, when it could not do so if the Board had not so declined?

2. If the answer to (1) is in the affirmative, may a state court do so on grounds the picketing though lawful under State law is an unfair labor practice under the Act?

3. If the answers to (1) and (2) are in the affirmative, may a state court do so where the alleged unfair labor practice consists of picketing for a union shop by a union not "designated" by the Board when the Board has declined to hold a representation election and the State of California has no procedure for doing so?

4. If the answers to (1), (2) and (3) are in the affirmative, does refusal by the Board's Regional Director to institute representation proceedings, without any attempt to review such refusal, vest the State Court with jurisdiction in an unfair labor practice case?

Statement of the Case.

Plaintiffs are engaged in the business of selling lumber and building materials as partners under the name of Valley Lumber Company. Defendants are the San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Drivers, Local 36. About November 15, 1952 the Unions requested a labor agreement with Plaintiffs under one of the terms of which certain employees were required to make application for membership in the unions within thirty days (30) after hiring.

The company refused to sign the agreement on the ground it would be a violation of the Act so to do before its employees or an appropriate unit thereof designated a union as their collective bargaining agent. Thereafter, the unions commenced peaceful picketing at the company's place of business. The picket carried a banner of moderate size upon which appeared the following: "A. F. of L. Picket Millmen's Union 2020, Teamsters' Union 36 invites employees to join."

Plaintiffs brought an action on May 7, 1953 in the Superior Court of San Diego, California, a court of general jurisdiction, to enjoin defendants from picketing their place of business and for damages. They alleged they were in interstate commerce, and that the contract requested of them would violate the Taft-Hartley Act since none of the unions had been certified by the Board.

Defendants by way of both Demurrer and Answer raised the question that the Superior Court had no jurisdiction since their activities, if illegal at all, were within the exclusive jurisdicton of the Board. Defendants, further, by way of Answer, raised the issue that plaintiffs failed to exhaust their remedies under the Act.

On the same day (May 7, 1953), Plaintiffs forwarded to the Regional Director of the Board a letter and Petition requesting the Board to determine the appropriate unit for voting and to hold the representation election. This the Regional Director refused to do. Plaintiffs did not appeal from this refusal. Plaintiff filed no unfair labor practices with the Board, their attorney testifying that: "We were doubtful that any labor practice by the unions was being committed in so far as the picketing of the plant of the plaintiff in this case was concerned." [R. T. p. 215.]

The Trial Court found that company operations affected interstate commerce in that it sold over $250,000.00 worth of materials originating and manufactured out of California; that the purpose of the picketing was to force execution of the foregoing labor agreement, and that the Board refused to accept jurisdiction for the purpose of a representation election. It applied the Taft-Hartley Act, awarded plaintiffs damages, and enjoined defendants from picketing and engaging in various other activities in order to require plaintiffs to discriminate wth respect to conditions of employment by reason of membership or lack thereof in the unions, until one or more of the unions had been designated by the Board. Since the State of California has no administrative procedure for union designation, the Trial Court in effect forbade picketing until such time as the Board would assume jurisdiction, determine the appropriate unit, order the election and certify the results thereof.

The unions appealed to the District Court of Appeal, 4th District, of the State of California, contending in substance that the Superior Court had no jurisdiction to enjoin activities contended to be an unfair labor practice under the Act; that the unions' requested contract and their conduct was entirely lawful and proper under California law, and that the Garmons had failed to exhaust their remedies before the Board.

The Appellate Court in a unanimous opinion on August 25, 1954 (127 A. C. A. 2d 320) Appendix "C," reversed the Trial Court holding in substance that while the claimed objectionable conduct of the unions was defined in the Act as an unfair labor practice, there was no state statute making it unlawful and therefore the State Court had no jurisdiction. The Court relied on *Garner v. Teamsters, Chauffeurs & Helpers Local 776,* 74 S. Ct. 161. The Appellate Court further concluded that since the Board had jurisdiction to determine plaintiffs' right to injunctive relief, the state court as such, was without jurisdiction until plaintiffs exhausted their administrative remedy.

The Garmons thereupon appealed to the Supreme Court of the State of California.

The Supreme Court of California on December 2, 1955 (45 A. C. 683), rendered a four to three decision holding in substance that where the Board declines to exercise its jurisdiction because of its jurisdictional yardsticks, such action amounts to a declaration that national

labor policy will not be jeopardized if a State Court assumes jurisdiction and enforces the Act. The majority reasoned that otherwise Congress would be denying a remedy to employers over whom the Board declines to exercise jurisdiction. Consequently, Congress intended to give state courts jurisdiction to enforce the Act in such circumstances.

The strong dissent held the foregoing reasoning to be fallacious because:

> "(1) The National Labor Board and the powers granted to it are an integral part of the federal law and that law is not intended to have application in a situation where the board plays no part; it is inescapable that the federal law is to be administered by the board, not by the state courts. (2) The board in refusing jurisdiction as it has power to do, has in effect determined that the federal law should not apply in this case. (3) It is neither feasible nor fair to apply the federal law. (4) There has not been such a refusal to exercise jurisdiction by the board here as to justify the conclusion that the state court has jurisdiction."

Reasons for Granting the Petition.

1. None of the questions presented in this case have been expressly decided by this Court. On the contrary, in at least three cases this court left undecided the precise questions involved here. (*Bethlehem Steel Co. v. New York State Labor Relations Board,* 330 U. S. 767, 776; *Garner v. Teamsters, Chauffeurs, etc.,* 346 U. S.

485, 488; *Building Trades Council v. Kinard Construction Co.,* 346 U. S. 933.) In the latter case, the Alabama Supreme Court had held a state court had jurisdiction to enjoin picketing of an interstate employer on the ground it constituted an unfair labor practice under the Act, where the employer alleged his interstate business volume fell short of the Board's jurisdictional standards. This court reversed, citing its opinion in *Garner, supra,* and stating:

> "Since there has been no clear showing that Respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so, the Court does not pass upon the question suggested by the opinion below of whether the State court could grant its own relief should the Board decline to exercise its jurisdiction."

2 The instant decision conflicts in principle with a decision of the 10th Circuit Court of Appeals in *Retail Clerks Local No. 1564 v. Your Food Stores,* 225 F. 2d 659 (Aug. 4, 1955). There, an interstate employer originally sought a state court injunction against picketing on the same grounds as in this case and on the theory of trespass. On removal to the Federal District Court for the District of New Mexico, the case was dismissed in reliance upon this court's decision in *Garner v. Teamsters,* 121 Fed. Supp. 339. Subsequently, the Regional Director of the Board advised the parties that the store did not meet its revised 1954 jurisdictional yardsticks. The employer then filed a new action in the state

court on trespass theory, claiming, *inter alia,* that the first decision was not *res adjudicata* because the Board's action revested the state court with jurisdiction. On removal, this argument was upheld by the Federal District Court, 124 Fed. Supp. 697, but the 10th Circuit Court of Appeals reversed, saying:

> "Moreover, the refusal by the National Labor Retions Board to entertain the instant grievance on its merits did not of itself alter the pertinent law thereby revesting the state court with authority to proceed. Amended Section 10(a) of the Act specifically provides what this court deems to be the only way state authorities can be vested with authority . . . within the exclusive purview of the Act. Unless and until there is an express ceding of jurisdiction to a proper state agency, exclusive jurisdiction remains in the federal agency. For the sake of order such must be true. Otherwise an interminable problem of determining jurisdictions would exist, throwing needless confusion into an area clearly pre-empted by Congress."

The instant decision is likewise in conflict with a decision of the New York Supreme Court, Appellate Division, in *New York State Labor Relations Board v. Waggs Transportation System,* 130 N. Y. S. 2d 731, 33 L. R. R. M. 2855 (March 25, 1954), holding that even if the Board should refuse jurisdiction over an interstate employer, the State Board would have no jurisdiction of unfair labor practice charges against him under the State

Act; and with a decision of a Michigan Court of Appeals in *Universal Car Co. v. Association of Machinists,* 35 L. R. R. M. 2087 (Nov. 1, 1954), holding that refusal of the Board to assert jurisdiction in the representation issue does not empower the state court to enjoin picketing allegedly in violation of both State and Federal statutes.

3. That these questions are of utmost importance to the practicing bar and to the economy of the country probably needs no proof. The volume of litigation and legal writing they have engendered (see Appendix E) stands as a monument to the confusion which exists among lawyers and litigants, and will exist until this court puts it to rest.

This confusion is not merely academic; the questions have enormous practical consequences for labor relations in interstate commerce.

It is difficult, however, to discuss these consequences apart from petitioner's belief that the decision of the court below is erroneous and probably in conflict with principles stated by this court. In order to avoid needless repetition, therefore, we shall discuss these topics together:

(a) In recent cases, this Court has emphasized the preemptive character of Federal labor legislation, *Garner v. Teamsters, Chauffeurs, etc. supra; Building Trades Council v. Kinard Construction Co., supra.* The primary reason asserted in favor of preemption in those decisions

was the evidenced Congressional desire for uniformity throughout the area of interstate commerce. We submit that widespread adoption of the theory below would destroy this uniformity by creating two federal labor laws, differing both in substance and procedure: one administered by the Board, in those industries in which it chooses to exercise jurisdiction, the other by state courts where the Board declines to do so.

This conflict is illustrated by the facts of this case. Here a union picketed for the purpose of inducing the employer to agree to a union shop. Because it had not been "designated" by the National Board as bargaining representative for that shop, it was found to have committed an unfair labor practice under the Act. The court issued this injunction on the ground that the Board had declined to act in a representation case involving the same employer; but *this same declination of jurisdiction renders impossible the very thing the court insists upon to legalize the picketing.* Even assuming designation by a state agency would satisfy the court (*cf. Fur Workers Union Local 72 v. Fur Workers Union No. 21238* (C. A. D. C., 1939) 1 Labor Cases 18,324, 70 App. D. C. 122 App'd per (1939), 2 Labor Cases 17,066, 308 U. S. 522 *contra*), California has no such agency; unless the Board took jurisdiction, the union would have no way of achieving designation. Though purporting to apply the Federal Act, the state court is in effect applying it piecemeal and in a wholly discriminatory fashion. If its theory were

adopted by courts of other states which, like California, have no designation procedure, the effect would be, in the name of the Act, to outlaw all picketing for a union shop in that area of interstate commerce over which the Board declines jurisdiction. Legislation for interstate commerce would supply the rule when the Board assumed jurisdiction and another, quite contrary to the spirit of the Act, when it declined.

As this court said in the *Garner* case:

> "A multiplicity of tribunals and a diversity of procedure are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. *The same reasons which prohibit Federal Courts from intervening in such cases, except by way of review or an application of the Federal Board, precludes state courts from doing so.* (Omitting citations.)
>
> "And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the confidence of the Federal Board also excludes state courts from like action." l. c. 491.

Then, too, apart from procedure a state court does not have the expertise in labor relations Congress felt necessary for dealing with such relations in interstate commerce. As stated in *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F. 2d 183 (14 Labor Cases 64,443):

> "A remedy in the courts not expressly given is not to be inferred, and especially is this true where

> Congress has worked out elaborate administrative machinery for dealing with the whole field of labor relationships . . . and has provided for the handling of unfair labor practices by an administrative agency equipped for the task."

(b) Through labor legislation, Congress sought to achieve certain affirmative policies in interstate commerce independently of Board action. Therefore, even though there may be no conflict with Board decisions where the Board declines to act, there is a very definite and extremely important conflict with the policies of the statutes involved.

For example, Section 7 of the Act protects the right of employees and labor organizations, to picket peacefully for most purposes. These rights are not dependent upon action by the Board. They are protected against interference, not only by employers (which is the only type of interference the Board could remedy) but by state action as well. (*Hill v. Florida,* 325 U. S. 538.) They extend to all employees whom the power of Congress under the Commerce Clause could reach. (*Amalgamated Association v. Wisconsin Board,* 340 U. S. 383, 391.) This was made clear in the *Garner* case, *supra;*

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained

by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."

* * * * * * * *

"We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded." l. c. 499.

There is a serious question in this case of denial of federally protected rights. The Act continues to protect picketing for a union shop, but qualifies this protection by insistence on Board certification. Where the Board declines to assert jurisdiction, that certification is impossible. Petitioner contends that in such cases the picketing remains protected in spite of lack of certification, at least where a State has no certification procedure.

Another affirmative policy of the federal legislation challenged by the decision below is that aimed at eliminating the use of the *ex parte* injunction by private parties in interstate commerce. The background of the Act indi-

cates that dissatisfaction with this method of dealing with labor management disputes by state courts was one factor behind federal policy. The Board is required to use a procedure quite different from that used by state courts in labor cases. The "reversion" theory seizes upon declination of jurisdiction by the Board as a ground for utilizing this same legislation to reinstitute the labor injunction as a regulatory technique in interstate commerce.

Congressional policy against the labor injunction is in turn part of a larger policy against adversary proceedings in disputes involving interstate commerce.

The two principal features of the Act—the determination of employee representation and the prosecution and prevention of unfair labor practices are the responsibility of the Board, a quasi-judicial tribunal, and the General Counsel, a prosecuting officer. The Act gives the General Counsel final authority on the question of whether an unfair labor practice complaint should issue.

Analyzing the nature of a representation proceeding, the United States Court of Appeals, Third Circuit, has declared:

> "A certification proceeding is of a non-adversary, fact-finding character in which the Board plays the part of a disinterested investigator seeking merely to ascertain the desires of the employees as to their representation. Section 9 (c) of the National Labor Relations Act [29 U. S. C. A. 159 (c)] confers a

wide discretion upon the Board as to the manner in which this investigation shall be made."

Southern Steamship Co. v. NLRB (C. C. A. 3d, 1941), 120 F. 2d 505.

Under the "reversion" theory, the Taft-Hartley Act would be turned into an instrument of aggressive litigation between union and management. The prosecutional function of the General Counsel could be arrogated by counsel for a private party in a State court—a result which Congress was presumably trying to avoid.

(c) In addition to destroying uniformity and conflicting with federal policy for labor relations in interstate commerce, the theory below, would create considerable uncertainty as to appropriate jurisdiction. As the court in the *Universal Car* case, *supra,* stated:

> "If the jurisdiction of the state courts is to depend —not upon the act of Congress and the actual jurisdiction of the NLRB—but upon the day-to-day or month-to-month discretionary exercise of jurisdiction by the Board, dependent upon changing budgetary conditions or upon its economic, social or political views at the moment, then neither the courts nor the litigants can know with any certainty where jurisdiction lies, nor whether in a given case jurisdiction existing at the time of its commencement will continue until its final decision."

(d) That such obstacles to uniformity, Congressional policy, and certainty of jurisdiction within interstate

commerce are contrary to the Act is evidenced by Section 10(a), (see Appendix E).

This section was amended in 1947 to meet doubts created by the decision of the majority of this court in the *Bethlehem* case, *supra,* as to whether the Board had the power to cede jurisdiction to the states. At that time, Congress was aware that at least three justices of this court were of the opinion that declination to exercise jurisdiction by the Board would not increase state jurisdiction, for Mr. Justice Frankfurter, joined by Mr. Justice Murphy and Mr. Justice Rutledge stated in a concurring opinion in the *Bethlehem* case:

> "I cannot join the Court's opinion because I read it to mean that it is beyond the power of the National Board to agree with State agencies enforcing laws like the Wagner Act to divide, with due regard to local interests, the domain over which Congress had given the National Board abstract discretion but which, practically, cannot be covered by it alone. If such cooperative agreements between State and National Boards are barred because the power which Congress has granted to the National Board ousted or superseded State authority, I am unable to see how State authority can revive because Congress has seen fit to put the Board on short rations."

Yet the amended Section provides for only one method of a state obtaining jurisdiction over labor relations in interstate commerce; and this method insured that the problems of nonuniformity, conflict of policy, and uncer-

tainty of jurisdiction discussed above would not arise. As this court stated in *Amalgamated Association v. Wisconsin Board, supra:*

> "When it amended the Federal Act in 1947, Congress * * * was * * * well aware of the problems in balancing state-federal relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co. v. New York Labor Board,* 1947, 330 U. S. 767, and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states."

In a footnote to this statement the Court, after citing Section 10(a) of the Act as amended by Taft-Hartley, said:

> "A proviso of 10(a) authorizes cession of jurisdiction to the states only where the state law is consistent with the federal legislation. This insures that the national labor policy will not be thwarted even in the predominantly local enterprises to which the proviso applies. S. Rep. No. 105, 80th Cong., 1st Sess. 26 (1947). See also minority views to the same report, *id.*, pt. 2, 38, agreeing as to this feature of the legislation."

The text then continues:

> "Congress knew full well that its labor legislation 'preempts the field that the act covers insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative. H. R. Rep. No. 245, 80th Cong., 1st Sess. 44 (1947)." 340 U. S. 397, 398.

This implication is made even clearer by the fact that Congress has twice rejected amendments to the Federal Act designed to accomplish what the court below accomplished by judicial decision. (S. 1264, introduced by Senator Ives in 1st Sess., 83rd Cong., 99 Cong. Rec. 1846 (1953) and S. Rep. No. 1217, 83rd Cong., 2d Sess. 28 (1954).)

Petitioner submits that Congress decided it would rather have no regulation than non-uniform regulation conflicting with Congressional policy and posing interminable jurisdictional conflicts. This does not mean the area must be unregulated, or that either unions or employers must go without remedies. The Board may yet see fit to assert more fully the jurisdiction given it; and states like California may, if they desire to exercise control, enact statutes identical to the federal legislation, and reach jurisdictional agreements with the Board. The fact that neither of these things have as yet occurred should not be used to destroy Congressional intent, or to deprive parties of their rights under federal legislation.

4. Finally, petitioner contends that even if a state court may do what the California court has done where the Board declines to assert jurisdiction, the facts in this case do not constitute such a declination. Refusal by the Regional Director of the Board to hold an election in a representation case, even though accompanied by mention of the scope of plaintiff's business, may have been for a variety of reasons. Employer should have petitioned the Board to act on his unfair labor practice charges; or at the very least he should have appealed to the Board from the Regional Director's refusal to act in the representation case. Otherwise, the confusion engen-

dered by the "reversion" theory would be multiplied by erroneous assumptions as to the Board's willingness to act. The arguments on this point are so well set out by Judge Carter in his dissenting opinion, however, that petitioner does not feel he should burden the court with repeating them here.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WALTER WENCKE,
JOHN C. STEVENSON,
CHARLES P. SCULLY,
MATHEW TOBRINER,
CHARLES HACKLER,
Counsel for Petitioners.

APPENDIX "A."

In the Superior Court of the State of California, in and for the County of San Diego.

Department No. 4. Before Hon. L. N. Turrentine, Judge.

J. S. Garmon, *et al.*, Plaintiffs, vs. San Diego Building Trades Council, *et al.*, Defendants. No. 180903.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiffs: Gray, Cary, Ames & Frye, By: James W. Archer.

For the Defendants: John T. Holt, C. E. Todd, and Thomas Whelan.

San Diego, California, Monday, May 18, 1953, 2:00 P. M.

The Court: Garmon against San Diego Building Trades Council.

Mr. Holt: Ready for the defendants.

Mr. Archer: Ready for the plaintiff, your Honor.

The Court: I stated in the beginning that I was going to reduce this to writing, but in preference to that, I will state my views in Court and if any of you want the transcript—which you needn't determine until I conclude—you can order it from the reporter. Probably those associated with Mr. Todd, at least, will want it.

The facts are relatively simple. The plaintiffs operate a lumber yard and are engaged in interstate commerce. They and their employees are unorganized in the sense that the employees do not have a bargaining agent of their own, nor have they designated any organized labor

unit to represent them, and, the employer has not recognized any bargaining agent of any type for the employees. Under that state of facts, two local unions, the defendants, went to the plaintiff employers and asked that a union contract be executed requiring that all of its employees be a member of one of the unions designated, or become such within thirty days after their employment and remain in good standing. The management or employers refused to sign such a contract, justifying their refusal on the grounds that the plaintiffs' employees were not members of any labor unions so far as they knew, were not required to be, at least, that they had not designated any union as a bargaining agent, nor had they designated a collective bargaining agent of their own to deal with the employer. The plaintiffs allege on information and belief that the employees do not desire to join or be represented by any of the defendants.

Thereupon, the defendants are charged with two separate acts. First, of the primary picketing of the plaintiffs' plant where the employees are employed, and secondly, of interference with and doing acts toward the patrons of plaintiffs such as material men, contractors and so on, which acts are ordinarily designated as a secondary boycott or secondary picketing, as distinguished from the primary picketing against the plant of the plaintiff itself.

As I understand it, neither the plaintiffs, the employers, nor any of the employees, nor any of the defendants, nor any other recognized union, has made any application to the National Labor Relations Board to have a representative appointed with whom they can deal as a collective bargaining agent representing the plaintiffs' employees. And, it is under these state of facts that the plaintiffs obtained a temporary restraining order and now seek a

temporary injunction restraining both primary picketing and secondary boycotting. The defendants claim that the Court has no jurisdiction, in that the exclusive jurisdiction vests in the National Labor Relations Board. Therefore, the State Courts have no jurisdiction whatsoever.

As I read the cases, I do not find that they are in complete accord, nor that I can arrive at any absolute decision supported by decisions directly in point by the Supreme Court of the United States or the Supreme Court of California. I have come to some conclusions in my own mind from the reading of these cases, and especially the Capital Service Case as amended May 12, 1953. I think that case is distinguished to this extent, that in that case, the plaintiffs had first invoked the jurisdiction of the National Labor Relations Board, and it had accepted jurisdiction of the case, and it was after the invoking of their jurisdiction and their acceptance of the same, that they went into the State Courts and sought to keep matters in statu quo until such time as the National Labor Relations Board had heard and determined the proceedings that plaintiffs themselves had initiated before the National Labor Relations Board. As I indicated previously in this case, none of the parties nor employees or other persons have sought the jurisdiction of the National Labor Relations Board.

It is hard for me to come to the conclusion that this so-called jurisdiction of the National Labor Relations Board is an absolute term, because first, they themselves may surrender, and secondly, they seem to have the power —at least they exercise the power—to reject an application made to them. They certainly have the power to delay it. And, if they have exclusive jurisdiction, that puts you in a state of doldrums that just isn't consistent with the reguar, orderly transaction of the business of the world

today. It puts you in a situation where if labor doesn't want them to act, they can hide behind that and do what they want to; where if management doesn't want them to act, they can hide behind that and take no action whatsoever. So, I think the real meaning of the law, and if there is any difference between the California Sommers case and allied cases and the Circuit Court decision, I would place more reliance on our Supreme Court decision than I would on the United States Circuit Court, because their decision is still subject to review by the United States Supreme Court, and until the United States Supreme Court has spoken, I would prefer to follow our Supreme Court.

It leads me to say this, that I believe that when no one interested, who could seek the jurisdiction of the National Labor Relations Board has done so, that if the acts are contrary to the law of the State, that the State Courts are not impotent to do anything, but have power to entertain litigation, that when the situation arises such as this, that when management can, that when employees can, that when organized labor unions can go to the Board, and refuse to do so or fail to do so, that then the State Courts are not powerless to handle unlawful acts which occur within their bounds. And, that is no hardship, because any one of the parties to this litigation, if they really sincerely believe that the National Labor Relations Board had the exclusive jurisdiction, could initiate or start proceedings on a moment's notice. So, I think that the State Court does have jurisdiction, for the reasons indicated.

Let me add this. I have no doubt that the National Labor Relations Board could affirmatively come in and take jurisdiction. So, it having failed to do that, no one else having asked it to do so, then, I think that this Court

has the jurisdiction to entertain this action. That resolves itself down to determining what acts of this case are lawful and what are unlawful. It is my belief that under the present law of the State of California and under the decisions of the United States Supreme Court, that when a business, an employer and employee are all unorganized and without the pale of organized labor in any manner, shape or form, and the employees have designated no bargaining agent of their own, that it is recognized fair practice for labor to exercise lawful economic sanctions in the manner of peaceful picketing, to try to get them to organize and become a part of labor. That is what is contemplated by the labor laws of America as they are established today. And, I don't think that the employees and the employer can sit back and say, "Well, somebody else has to get a collective bargaining agent. Somebody else has to get us a representative, and we won't do it ourselves. We will just rock here and nobody can do anything about it." So, as far as the picketing of the employer itself to the extent that it is done peacefully and lawfully, I think it is a perfectly lawful act of labor. The placard which they were displaying, as I remember it, was not out of line. I think the State Courts, of course, can control the manner of picketing, in that they must keep the peace and not make false representations, but I think the placard they displayed, if that is the extent of the primary picketing, they have the right to do so. If the numbers are kept within due bounds—usually, by practice, I presume, limited to not more than three at a time, operating singly and not together, so as not to block entrances, and are such as they are legitimately advertising that it is what they call unfair, I think it is perfectly lawful.

In regard to the secondary boycott, I think that is just as unlawful, and they have no right to do that under the law of California as it exists today.

So, the temporary injunction, so far as it follows the temporary restraining order, will be denied so far as primary peaceful picketing with placards in the same form as that introduced in court, is used, not more than three pickets to an entrance, they, not to bunch up so as to form a flying wedge, so to speak, and such as to give legitimate notice that a labor dispute is in existence, or that—when I use the term "labor dispute", you understand what I mean. I think they have the right to characterize it as unfair to labor, as that term has been interpreted by the courts, and no further. And, insofar as secondary boycotting is concerned, that should be restrained, be it direct or indirect. And, that will be the order of the Court. Will there be any bond requested on that feature of the case if I can get you to trial within ten or fifteen days, on the merits?

Mr. Whelan: I doubt that we need a bond, your Honor. If we did, it would only be nominal. So, I think we will waive the bond.

Mr. Holt: I think so, for my clients.

* * *

The Court: Well then, we will set it for trial on the merits on June 1st. You may have until Friday to file your answer.

Mr. Holt: We will have it by five o'clock Friday for sure.

The Court: All right. You can draw your order reciting that the bond was waived, also the motion to strike is denied.

Mr. Archer: Very well.

State of California, County of San Diego—ss.

I, John L. Stewart, an official reporter of the Superior Court of the State of California, in and for the County of San Diego, do hereby certify that as such reporter I reported in stenotypy the testimony adduced and the proceedings had at the trial of the above-entitled cause, and that the above and foregoing transcript, consisting of pages numbered from 1 to 7, inclusive, is a full, true and correct transcript of all of the testimony and evidence adduced and proceedings had at the trial of said cause.

Dated at San Diego, California, May 19, 1953.

John L. Stewart

Official Reporter.

APPENDIX "B."

Gray, Cary, Ames & Frye, 1410 Bank of America Bldg., San Diego 1, California, Telephone: Franklin 7323, Attorneys for Plaintiffs.

Filed Jul. 31, 1953. T. H. Sexton, Clerk; by L. M. Adams, Deputy.

In the Superior Court of the State of California, in and for the County of San Diego. No. 180903.

J. S. Garmon, J. M. Garmon and W. A. Garmon, Plaintiffs, vs. San Diego Building Trades Council, Millmen's Union, Local #2020, Building Material and Dump Truck Drivers, Local #36, John Does I to X inclusive, Defendants.

Entered Jul. 31, 1953. Judgment Book 14, Pg. 25.

JUDGMENT

The above entitled case came on regularly for trial on the 1st day of June, 1953, before the Honorable John A. Hewicker, judge of the Superior Court, in Department One thereof, Gray, Cary, Ames, & Frye by James W. Archer appearing for plaintiffs and Thomas Whelan, John T. Holt and Todd & Todd by Clarence E. Todd appearing for defendants, and evidence having been introduced and said case having been fully tried, argued and submitted, and the court having been fully advised in the premises, and the court having made its Findings of Fact and Conclusions of Law, Now, Therefore, pursuant to the said Findings of Fact and Conclusions of Law;

It Is Ordered, Adjudged and Decreed that the defendants be, and they and each of them and their officers, members, agents, employees and all others acting on their behalf are hereby enjoined from picketing the places

of business of plaintiffs, from following the trucks of the plaintiffs, from preventing or attempting to prevent, by means of threats, expressed or implied, persons having business with the plaintiffs from entering the premises of the plaintiffs, from inducing or attempting to induce by such means potential customers of plaintiffs to refuse to purchase from plaintiffs or to refuse to accept delivery of goods from plaintiffs or in plaintiffs' trucks, and from doing any other acts tending or intended to injure plaintiffs' business, in order to compel plaintiffs to execute any contract with the defendants, or any of them, requiring plaintiffs to discriminate with respect to conditions of employment by reason of membership, or lack thereof, in any labor organization unless and until defendants, or any one or more of them, have been properly designated as the collective bargaining representative of plaintiffs' employees or an appropriate unit thereof;

It Is Further Ordered, Adjudged and Decreed that the plaintiffs have and recover from the defendants and each of them, damages in the sum of One Thousand Dollars ($1000.00) together with their costs of suit herein incurred in the amount of $41.90.

Done in Open Court This 31 Day of July, 1953.

JOHN A. HEWICKER,
Judge of the Superior Court.

APPENDIX "C."

Opinion of the District Court of Appeal.

In the District Court of Appeal in and for the Fourth Appellate District, State of California.

J. S. Garmon, J. M. Garmon and W. A. Garmon, Plaintiffs and Respondents, vs. San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Truck Drivers, Local 36, Defendants and Appellants. 4th Civil No. 4854.

Filed Aug. 25, 1954.

Appeal from a judgment of the Superior Court of San Diego County, John A. Hewicker, Judge. Reversed.

Todd and Todd; Thomas Whelan; and John T. Holt for appellants.

Gray, Cary, Ames & Frye; James W. Archer; and Ward W. Waddell, Jr. for respondents.

Plaintiffs, who are owners and proprietors as copartners of a lumber business operating under the name of Valley Lumber Company, brought this action on May 7, 1953, to enjoin defendants from picketing plaintiff's place of business and for damages.

On or about November 15, 1952, Morris Collins, secretary of defendant San Diego Building Trades Council, called at plaintiff's place of business in Escondido and requested plaintiffs to sign a union contract. The contract submitted required plaintiffs to employ union labor in that it required plaintiffs' employees to be or become and remain members in good standing of defendant unions. Plaintiffs refused to sign this agreement, stating that they had no request from their men so to do. There-

after Collins called on plaintiffs several times and was told that they were not ready to sign; that they did not know whether their employees wanted to become union members or not; and that Collins could discuss the matter with them.

Mr. Rutledge, plaintiffs' yard foreman, testified that on or about April 1, 1953, Mr. Garmon brought a union representative into the yard to talk to the men; the latter read the agreement to them and explained its provisions; the men discussed it and decided at that time to leave it up to plaintiffs as to whether they "wanted the union to enter." Subsequent to this meeting a second meeting was held at which no representative of the management or unions was present and at which the men definitely decided not to join the union. The plaintiffs had informed their employees that it was up to them to decide whether they wished to join the union. About the middle of April the company informed the union representatives of the decision of the men not to become union members. (Found in opinion of Appellate Court.)

Plaintiff William Garmon testified that after Collins talked with the men he stated they "were interested"; that a few days later he told Collins that as far as he knew, the men were perfectly satisfied and that he saw no advantage to plaintiffs in signing a contract; that the men had not requested such action; that some time in April a Mr. Taylor (a union representative) came in and "wanted to know if we were ready to sign up their contract with them and I told him no and he says, 'Well, we are just going to have to do this the hard way.' I told him, 'You will just have to do it. We are not willing to sign any contract and if that is

the way you want to do it, you will just have to do it the hard way.' So he left and he said, 'I will see you with a picket tomorrow morning'"; that the next morning, April 28th, a picket was placed near the entrance to plaintiffs' yard but on the highway and not on plaintiffs' property. The picket carried a banner of moderate size on which appeared the following:

"A. F. OF L.
PICKET

MILLMAN'S UNION 2020
TEAMSTER'S UNION 36
INVITES EMPLOYEES TO JOIN."

The picketing on the part of the unions was without violence, no untruths were claimed and there was no breach of the peace. There was only one banner carried at a time. There was no secondary boycott. No one was stopped entering or leaving plaintiff's property and no deliveries either way were stopped (by the defendants). There was evidence that on numerous occasions plaintiffs' trucks were followed when they made deliveries and that union trucks were seen circling jobs at which deliveries had been made and that as a result of this it was necessary for the plaintiffs to make delivery of merchandise through other yards. (Opinion of Appellate Court.)

There was testimony that union agent Collins told the manager of another lumber company in Escondido that "they couldn't do anything and that they guessed they would have to get tough with him now" (referring to the Valley Lumber Company), and that Collins told contractors and others that the Valley Lumber Company was being picketed.

The trial court found, in part, that during the past year plaintiffs have sold lumber and other materials of the value in excess of one quarter of a million dollars, which originated and were manufactured outside of the state of California; that plaintiffs' business affects interstate commerce; that defendants demanded that plaintiffs sign the union contract referred to herein; that none of the defendants offered or produced any evidence that any employee of plaintiffs has designated any of said unions as his collective bargaining representative; that none of the defendant unions had been recognized by the plaintiffs or certified by the National Labor Relations Board as the representative of any employee of the plaintiffs; that none of the defendants has been designated or is the collective bargaining agent for any employee of the plaintiffs and the said employees have indicated that they do not desire to join or be represented by any of the defendants; that the plaintiffs declined to execute the said contract and informed the defendants that they could not enter into it or any contract containing the provisions relative to union membership of the employees unless and until it should appear that the plaintiffs' employees or some appropriate unit thereof designates one of the defendants union as their collective bargaining agent; that on or about April 28, 1953, the defendants placed pickets around the place of business of plaintiffs in Escondido and maintained pickets there up to and including the trial of the action; that by the placing of the picket line about plaintiffs' place of business the defendants intended to compel the plaintiffs to enter into certain union agreements and did not intend to induce the employees of plaintiffs to join the said union or to educate the plaintiffs or the employees of plaintiffs or to inform

said employees of the benefits of unionization or to accomplish any other objective than to destroy the business of plaintiffs or to compel plaintiffs to execute said agreement without regard to the legality of doing so; that by the use of said pickets and by following the plaintiffs' trucks and by threatening persons doing business with plaintiffs and persons entering or about to enter plaintiffs' place of business with economic injuries, and by using language in the said picket lines calculated to instill fear of economic injury to such persons and by other means, and in order to compel the plaintiffs to execute the said agreement, even though it would be illegal to do so, the defendants and each of them have induced a number of the contractors engaged in the construction industry in or about the city of Escondido to cease doing business with plaintiffs and to refuse to accept deliveries in plaintiffs' trucks and have induced various suppliers of materials and common carriers of freight to refuse to make deliveries to plaintiffs and have prevented persons intending to enter plaintiff's place of business from doing so and thereby have injured plaintiffs' business and put them to great expense in making deliveries and picking up supplies purchased by them; that as a result of the acts of defendants plaintiffs have lost business and profits and their business has been damaged in the sum of $1,000.00; that the National Labor Relations Board has, pursuant to a policy declared by it, refused to take jurisdiction of the controversy between plaintiffs and defendants for the purpose of determining whether defendants should be designated as the collective bargaining representatives of the employees of plaintiffs.

Judgment was entered enjoining the defendants from picketing the place of business of plaintiffs, from follow-

ing their trucks, from preventing by means of threats persons having business with the plaintiffs from entering the premises of plaintiffs, from inducing by such means potential customers of plaintiffs to refuse to purchase from plaintiffs or to refuse to accept deliveries of goods from plaintiffs and from doing any other acts intended to injure plaintiffs' business in order to compel plaintiffs to execute any contract with the defendants, or any of them, requiring plaintiffs to discriminate with respect to conditions of employment by means of membership, or lack thereof, in any labor organization unless and until defendants or any one or more of them have been properly designated as the collective bargaining representatives of plaintiffs' employees or an appropriate unit thereof, and that plaintiffs have and recover damages in the sum of $1,000.00.

It is first contended that the Superior Court had no jurisdiction to entertain the suit herein or enter the judgment appealed from. While the appellants contend that the evidence shows that defendants were picketing plaintiffs' place of business for the purpose of inviting the employees to join the union, there was evidence to support the trial court's finding that their purpose was to compel plaintiffs to execute a union contract when none of the unions involved had been designated as the collective bargaining agent for said employees. The determination of the purpose or object sought to be accomplished by the picketing was one of fact for the trial court. (Standard Grocer Co. v. Local No. 406 of A. F. of L., 321 Mich. 276; 32 N. W. 2d 519, 529.)

The National Labor Relations Act, as amended in 1947 (29 U. S. C. A. 1953 Cumulative Pocket Part, pages 48 and 49) provides that it is an unfair labor

practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization and for a labor organization to force or require an employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of the title (Sec. 158 (4) (B).)

In Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776, 74 S. Ct. 161, decided December 14, 1953, petitioners were engaged in the trucking business and had 24 employees, four of whom were members of respondent union. The trucking operations formed a link to an interstate railroad. No controversy, labor dispute or strike was in progress, and at no time had petitioners objected to their employees joining the union. Respondents, however, placed rotating pickets, two at a time, at petitioner's loading platform. None were employees of petitioner. They carried signs reading "Local 776 Teamsters Union (A. F. of L.) wants Employees of Central Storage & Transfer Co. to join them to gain union wages, hours and working conditions." Picketing was orderly and peaceful but drivers of other carriers refused to cross this picket line and, as most of petitioners' interchange of freight was with unionized concerns, their business fell off as much as 95 per cent. The court below found that respondents' purpose in picketing was to coerce petitioners into compelling or influencing their employees to join the union and concluded, after reviewing the Labor Management Relations Act (29 U. S. C. A., Sec. 141 *et seq.*) that such provisions for a comprehensive remedy precluded any state action by way of a

different or additional remedy for the correction of the identical grievance. The Supreme Court said:

"Congress has taken in hand this particular type of controversy where it affects interstate commerce. In language almost identical to parts of the Pennsylvania statute, it has forbidden labor unions to exert certain types of coercion on employees through the medium of the employer. It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us. But it is clear that the Board was vested with power to entertain petitioners' grievance, to issue its own complaint against respondents and, pending final hearing, to seek from the United States District Court an injunction to prevent irreparable injury to petitioners while their case was being considered. The question then is whether the State, through its courts, may adjudge the same controversy and extend its own form of relief. . . .

"We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded. Of course, Congress, in enacting such legislation as we have here, can save alternative or supplemental state remedies by express terms, or by some clear implication, if it sees fit.

"On the basis of the allegations, the petitioners could have presented this grievance to the National Labor Relations Board. The respondents were subject to being summoned before that body to justify their conduct. We think the grievance was not subject to litigation in the tribunals of the State."

In Capital Service v. National Labor Relations Board, 74 S. Ct. 699, decided May 17, 1954, it was held that where Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right.

In Gerry of Calif. v. Superior Court, 32 Cal. 2d 119 [194 P. 2d 689] it was held that under the National Labor Relations Act as amended in 1947, the State court has no jurisdiction, at the suit of a private person to enjoin union activities affecting interstate commerce when covered by the federal act: It was there said, quoting from Amalgamated U. Workers v. Consolidated Edison Co., 309 U. S. 261, 264 [60 S. Ct. 561, 84 L. Ed. 738]:

" 'Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective.' The Supreme Court pointed out that the course of procedure was definite and restricted; that the board and the board alone could determine whether an employer had engaged in an unfair labor practice; that the board was chosen as the instrument or agency, exclusive of any private person or group, to assure

protection from the described unfair conduct in order to remove obstructions to interstate commerce, and that the board alone was authorized to take proceedings to enforce its order. The sole authority of the board to secure prevention of unfair labor practices affecting commerce was thus recognized."

It was further said:

"The provisions of the 1947 act show an intent to preserve the functional purposes of the National Labor Relations Act with increased objectives, and an intent not to confer powers on the courts at the suit of private parties with the exception of the jurisdiction expressly granted, which does not include the exercise of equity powers. . . . . The employers as well as the union is now required by the 1947 act to proceed before the board to obtain appropriate relief from unfair labor practices affecting interstate commerce. The alleged cause for injunctive relief presents matters for the board to determine in the first instance pursuant to the exercise of power vested by the National Labor Relations Act as amended by the 1947 act. There is nothing in the act as so amended which indicates that these unions may not thus be subject to the appropriate procedure thereby provided."

In *In re* DeSilvia, 33 Cal. 2d 76 [199 P. 2d 6], an employer had secured an injunction on the ground that the picketing was unlawful under the Labor Management Relations Act, 1947, since there had been no certification of a union representative. It was there held that the injunction issued was void, its object being to accomplish something which was within the exclusive jurisdiction of the National Labor Relations Board under

the terms of the federal act. In commenting on the Gerry case, *supra*, the court said:

"This court there held that the declared intent and purpose of the Labor Management Relations Act, 1947, was to vest exclusive jurisdiction in the National Labor Relations Board over unfair Labor practices affecting interstate commerce and to vest in the courts generally jurisdiction only of action for damages arising out of the commission of such practices, and that the act deprived the superior courts of original equitable jurisdiction in such cases."

The case of Sommers v. Metal Trades Council, 40 Cal. 2d 392 [254 P. 2d 539], involved a claimed violation of the jurisdictional Strike Act. (Lab. Code, Sec. 115 *et seq.*) and the same union activitiy was declared to be an unfair labor practice by the National Labor Relations Act, as amended. The question there was whether the state court had jurisdiction to enforce the provisions of the state statute making the defined union jurisdictional activity unlawful and subject to restraint. It was held that the trial court did not abuse its discretion in granting an injunction order pending a trial on the merits. The court discussed the Gerry case, *supra*, and observed that there the petitioners contended that the state had concurrent jurisdiction with the National Labor Relations Board to enforce the provisions of the federal act and that the decision rejecting this contention was a determination that in the absence of a valid, applicable local statute affording relief, facts which amount to unfair labor practices under the federal act are cognizable exclusively in a proceeding before the National Board. After discussing several United States Supreme Court cases on the subject, the court said:

"It is thus apparent that the factors of protection and condemnation under the federal act largely determine whether the area is one closed to state control. The decisions indicate that the presence of those factors are deemed to disclose an intention on the part of Congress to place exclusive jurisdiction in the National Board."

In the instant case plaintiffs pleaded and the court found that they were engaged in interstate commerce. The claimed objectionable conduct of the unions is defined in the federal act as an unfair labor practice but there is no state statute making it unlawful as was the case in Sommer v. Metal Trades Council, *supra*. We therefore conclude that the state court in the instant action had no jurisdiction to grant the permanent injunction herein.

It is argued that although the federal law is applicable, the National Labor Relations Board has, as a matter of policy, declined to accept jurisdiction and that there can be no conflict of remedies between the courts and the board. However, the evidence shows that on May 7, 1953, palintiffs' counsel mailed to the National Labor Relations Board a petition by the Valley Lumber Company for determination of representation of its lumber yard and delivery workers. This petition was apparently dismissed by the regional director for the reason that the scope of the business involved did not justify further proceedings. The petition contained no application to the National Board to take jurisdiction of an unfair labor practice charge and the evidence fails to show a refusal of the board to assume jurisdiction of the acts and conduct of the unions involved in that connection. Since the National Labor Relations Board had jurisdiction to deter-

mine plaintiffs' right to injunctive relief herein, the state court was without jurisdiction until plaintiffs exhausted their administratve remedy. (United States v. Superior Court, 19 Cal. 2d 189, 195; Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 292; Woodward v. Broadway Fed. S. & L. Assn., 111 Cal. App. 2d 218, 220; Myers v. Bethlehem Shipbuilding Corporation, 303 U. S. 41; 82 L. Ed. 638.)

Respondents argue that the federal law does not prevent a state court from awarding damages for a violation of a state public policy which does not conflict with the federal law; that the remedy in the instant case is for intentional, unexcused injury to the business of another and that the injury herein is unexcused because for an unlawful purpose, namely, to compel the execution of a contract in violation of the National Labor Relations Act.

In United Const. Workers, Etc. v. Laburnum Const. Corp., *supra*, the court held that the Labor Management Act of 1947 (National Labor Relations Act, Sec. 10 (c), as amended by Labor Management Relations Act of 1947, 29 U. S. C. A. Sec. 160 (c); Labor Management Relations Act of 1947, Sec. 303 (b), 29 U. S. C. A. Sec. 187 (b).), did not give the National Labor Relations Board such exclusive jurisdiction over the subject matter of common law court actions for damages as would preclude an appropriate state court from hearing and determining its issues even though such conduct constitutes unfair labor practice under that act; that Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. However, in this state peaceful picketing is a lawful form of

concerted action by members of the labor union. (Shafer v. Registered Pharmacists Union, 16 Cal. 2d 379, 382, [106 P. 2d 403].) As was said in Seven Up Etc. Co. v. Grocery Etc. Union, 40 Cal. 2d 368, 374: "Peaceful picketing has been identified with freedom of speech—a means by which the pickets communicate to others the existence of a labor controversy." (Citing many cases.) In Park & T. I. Corp. v. Int. Etc. of Teamsters, 27 Cal. 2d 599, 603, the court said:

"In this state 'a union may use the various forms of concerted action, such as strike, picketing, or boycott, to enforce an objective that is reasonably related to any legitimate interest of organized labor' but 'the object of concerted labor activity must be proper and . . . must be sought by lawful means, otherwise the persons injured by such activitiy may obtain damages or injunctive relief.' (James v. Marinship Corp., 25 Cal. 2d 721, 728, 729 [155 P. 2d 329], and authorities there cited.)"

In McKay v. Retail Auto. S. L. Union No. 1067, 16 Cal. 2d 311, 319, the court said:

"Concerning the means used, it must be taken as settled in this state, that workmen may associate together and exert various forms of economic pressure upon employers, provided they act peaceably and honestly. The conventional means of exerting this economic pressure which have been held lawful are the strike . . . the boycott, both primary and secondary . . . and the picket . . ."

In Fortenbury v. Superior Court, 16 Cal. 2d 405, 410, it is held that the law does not invariably give relief against damage, because in some circumstances the infliction of damage, though intentional, is without legal rem-

edy. "So far as cases of picketing or boycott are concerned, there is no remedy for damage which may be inflicted where, as here, the means are peaceful and the purpose is reasonably related to working conditions or the right to bargain collectively."

In Bautista v. Jones, 25 Cal. 2d 746, 755, Mr. Justice Edmonds, in his concurring opinion, states:

"And in the exercise of its constitutional right of free speech, a union is privileged intentionally to induce others, in their relation with an employer, to apply economic pressure upon him resulting in injury. However, this privilege to interfere with a competitor's valuable and legally protected economic interests is not an absolute one, but is qualified and conditional.

"The first limitation which has been applied by this court is that a union, in compelling compliance with its demands through the application of economic pressure, induced by publication of the facts and solicitation of support, is privileged to invade the interests of others only where it employs peaceful and truthful means. (Citing cases:) The second general condition necessary to justify the invasion of economic interest is that the end be lawful. 'Any injury to a lawful business . . . . is *prima facie* actionable, but may be defended upon the ground that it was merely the result of a lawful effort of the defendants to promote their own welfare.' (J. F. Parkinson Co. v. Building Trades Council, *supra.*)"

In the instant case the attempt by the unions to induce plaintiffs to sign the contract involved is not made unlawful by statute in this state. The means used were peaceful and the purpose is reasonably related to working conditions and the right to bargain collectively. Dam-

ages, if any, suffered by plaintiffs were occasioned by the presence of a picket near plaintiffs' place of business, carrying a banner inviting plaintiffs' employees to join the union and not by the alleged purpose of the picketing. Moreover, the award of damages in the sum of $1,000.00 was apparently based on the testimony of one Glenn Bailey that he had once purchased materials from the plaintiffs but that he had overheard a conversation between a union representative and the witness contractor in which they were discussing the picketing of plaintiffs' place of business; that he had intended to buy his materials on a new job from plaintiffs but had changed his mind; that the approximate cost of materials on the new job was $4,000.00. The award of $1,000.00 damages was not supported by substantial evidence that it was caused by the tortious conduct of defendants or any of them.

The attempted appeal from the order overruling the demurrer herein is dismissed as such an order is not appealable. (Garroway v. Jennings, 180 Cal. 97; Southern Cal. Tel. Co. v. Damenstein, 81 Cal. App. 2d 216; Cook v. Stewart McKee & Co., 68 Cal. App. 2d 758.)

Judgment reversed.

MUSSELL, *J.*

I Concur:

BARNARD, *P. J.*

APPENDIX "D."

Opinion of the Supreme Court of the State of California

In the Supreme Court of the State of California in Bank.

J. S. Garmon, J. M. Garmon and W. A. Garmon, Plaintiffs and Respondents, vs. San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Drivers, Local 36, Defendants and Appellants. L. A. 23005.

Filed Dec. 2, 1955.

The Garmons, while engaged in business as partners under the name of Valley Lumber Company, became involved in a dispute with union labor organizations. The appeal is from a judgment which enjoins the unions and their members from carrying on certain activities and awards damages in the amount of $1,000 against them.

Following a trial, the court made these findings of fact:

Valley Lumber Company is engaged in the business of selling lumber and building materials, and its operations affect interstate commerce. In the previous year it sold materials originating and manufactured out of California of a value exceeding $250,000. None of its employees belong to any of the defendant unions and none have designated either of them as a labor representative. The employees have indicated that they do not desire to join, or be represented by, a union. The National Labor Relations Board has not certified either of the unions as the representative of the employers and the company has not recognized any union as such.

The union demanded a labor agreement containing a clause which would require the company to employ, and continue in employment, only such persons as are, or immediately become, members of the defendant unions.[1] The company refused to execute the agreement, upon the grounds that it would be a violation of the National Labor Relations Act to do so before the employees, or an appropriate unit thereof, designated a union as its collective bargaining agent. Shortly thereafter, the unions placed pickets at the company's place of business.

The intent of the unions was not to induce the employees to join one of them, or to provide education or information as to the benefits of unionization. The only purpose was to force the company to execute the agreement or suffer destruction of its business. In addition to picketing, union agents followed the company's trucks and threatened persons about to enter its place of business with economic injury. By this conduct, and the use of language calculated to instill fear of such injury, the unions induced building contractors to discontinue their patronage of the company, with subsequent damage to the business amounting to $1,000.

The National Labor Relations Board, ". . . pursuant to a policy declared by it, refused to take jurisdiction of the controversy between plaintiffs and defendants for the

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[1]"Pursuant to the terms of Section 8(a)(3) of the Labor Management Relations Act, 1947, there shall be no limitation of the Employer as to whom he shall employ, continue in employment, or discharge, except that every employee listed under Section III, (A) and (B), hereof not otherwise excluded, shall be, or shall make application within thirty (30) days, become and remain a member in good standing of Millmen's Union, Local 2020, of the United Brotherhood of Carpenters and Joiners of America, or Building Material and Dump Truck Drivers, Local 36."

purpose of determining whether defendants should be designated as the collective bargaining representative of the employees of plaintiffs."

Upon these findings a judgment was entered which awards the company $1,000 damages and enjoins the unions ". . . from picketing the places of business of plaintiffs, from following the trucks of the plaintiffs, from preventing or attempting to prevent, by means of threats, express or implied, persons having business with the plaintiffs from entering the premises of the plaintiffs, from inducing or attempting to induce by such means potential customers of plaintiffs to refuse to purchase from plaintiffs or to refuse to accept delivery of goods from plaintiffs or in plaintiffs' trucks, and from doing any other acts tending or intended to injure plaintiffs' business, in order to compel plaintiffs to execute any contract with the defendants, or any of them, requiring plaintiffs to discriminate with respect to conditions of employment by reason of membership, or lack thereof, in any labor organization unless and until defendants, or any one or more of them, have been properly designated as the collective bargaining representative of plaintiffs' employees or an appropriate unit thereof."

The unions contend that jurisdiction of the controversy is exclusively in the National Labor Relations Board. They also attack the judgment upon the grounds that the company did not exhaust its administrative remedies. Other points presented are: the evidence does not support the findings; the findings do not include all issues tendered; the award of damages is based upon evidence entirely speculative; and, the record shows no violation of any state law.

In support of the judgment, the company asserts that the jurisdiction of the national board is not exclusive, or if it is, the state court may enjoin unlawful conduct when the board has declined to act. Another point relied upon is that, regardless of state jurisdiction to enjoin the unions, the superior court's award of damages for violation of the state's public policy is not contrary to any federal law.

The National Labor Relations Board has exclusive primary jurisdiction to prevent unlawful demands. (Weser v. Anheuser-Busch, Inc., ... U. S. .....; Garner v. Teamsters, Chauffeurs, and Helpers, etc., 74 S. Ct. 161; United Construction Workers v. Laburnum Const. Corp., 347 U. S. 656; Bethlehem Steel v. N. Y. State LRB, 330 U. S. 769.) The purpose of the picketing was to compel the company to sign an agreement which included a clause requiring the employer to encourage membership in the unions. In the circumstances here shown, under the Labor Management Relations Act, this was an unfair labor practice.[2]

In the Garner case, a Pennsylvania court enjoined picketing which, contrary to a state statute, was being carried on for the purpose of coercing an employer to compel or "influence" employees to join the union. The

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[2](a) "It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

(b) "It shall be an unfair labor practice for a labor organization or its agents . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ." (29 U. S. C. §158.)

State Supreme Court reversed the judgment upon the ground that the employer's sole remedy was that provided by the National Labor Management Relations Act. (Garner v. Teamsters, [Pa.] 94 A. 2d 893.) The United States Supreme Court agreed, holding "that petitioner's grievance fell within the jurisdiction of the National Labor Relations Board to prevent unfair labor practices . . ."

However, the Board need not accept every controversy of which it has jurisdiction. (Haleston Drug Stores v. National Labor Relations Board, 187 Fed. 2d 418. See discussion by Philip Feldblum, Jurisdictional "Tidelands" in Labor Relations, 3 Labor Law Journal 114.) It hears and determines controversies only in connection with "enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce." (National Board Press release dated October 6, 1950.)

In the present case, the employer's position is that, when the National Labor Relations Board refuses to take jurisdiction of a dispute because the effect of the company's business on interstate commerce is not substantial, the state courts may act. The United States Supreme Court has not decided this question. In the Garner case it pointed to the lack of any indication that "the federal Board would decline to exercise its powers once its jurisdiction was invoked." (Garner v. Teamsters, etc., 74 S. Ct. 161 at 164.) Later in Building Trades Council *et al.* v. Kinard Construction Co., 346 U. S. 933, in reversing a state court's affirmance of an injunction on the authority of the Garner case, it said: "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so, the

Court does not pass upon the question suggested by the opinion below of whether the state court could grant its own relief should the Board decline to exercise its jurisdiction."

The reason for prohibiting state courts from acting in cases in which the Board has jurisdiction is to obtain uniform application of the substantive rules as expressed by Congress, and to avoid diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. (Garner v. Teamsters, etc., 74 S. Ct. 161, 166.) A remedy under federal laws available to an injured party may justify pre-emption of the field of labor relations, but when the application of that rule would result in the loss of all protection, there is no reason to bar state courts from providing relief. There is no conflict of jurisdiction when the federal board determines not to adjudicate the issues. Furthermore, a refusal to accept jurisdiction upon the ground that the issue presented does not sufficiently affect the national welfare to justify the Board's attention, in effect, is a declaration that the national labor policy will not be jeopardized if the state assumes jurisdiction.

When Congress enacted the applicable statutes, it must have been aware that an unfair labor practice may affect management and labor in a small business to the same extent as in a large industry. The difference is only the effect on the national labor and economic level. Certainly Congress did not intend to deprive a business having only a limited effect on interstate commerce of all protection in a labor-management controversy. By giving the Board discretion to accept or refuse jurisdiction, the legislative purpose must have been to give the state courts jurisdiction when the Board specifically determines that the

controversy will not affect the national economy. (Accord: Your Food Stores v. Retail Clerks' Local No. 1564, 124 Fed. Supp. 697, 703; Truck Drivers, Etc. v. Whitfield Transportation, 273 S. W. 2d 857, 860; But *Cf.*: New York State Labor Relations Board v. Wags Transportation System, 130 N. Y. S. 2d 731; Universal Car & Service Company v. International Association of Machinists, 27 CCH Labor Law Reporter, 68,825.)

In the present case, the employer filed a petition for determination of representation, pursuant to the provisions of the National Labor Relations Act. It was informed by letter that "The amount of business done by Valley Lumber Company in interstate commerce is insufficient for the Board to assert jurisdiction on the basis of previous Board decisions." Later, the regional director of the Board dismissed the petition, after a careful investigation. He stated that "in view of the scope of the business operation involved, it would not effectuate the purposes of the National Labor Relations Act to institute further proceedings at this time . . ." It appears without conflict that only $250,000 of the company's business during the preceding year was in interstate commerce, either directly or indirectly. In view of the general pronouncement by the Board (Press Releases dated October 6, 1950 and July 14, 1954) that it will exercise jurisdiction only when an "enterprise" has a direct inflow of material valued at $500,000 a year, or an indirect flow valued at $1,000,000, a request for review of the Regional Director's action would have been futile.

The general policy of the Board in regard to jurisdiction makes no distinction between an application to determine representation and one complaining of an un-

fair labor practice. A refusal to take jurisdiction of a controversy concerning representation constitutes a refusal to accept jurisdiction of a complaint against that employer which charges an unfair labor practice. In C. A. Braukman, etc. and International Union of Operating Engineers, 94 N. L. R. B. 234, the Board said, "True, the Board has not heretofore considered the instant complaint case. However, because the Board does not, with respect to the question of jurisdiction, differentiate between representation and complaint cases, we believe that dismissal of the . . . representation case on jurisdictional grounds . . . . was in effect, notice to all parties concerned that any complaint case based on alleged unfair labor practices . . . . would similarly be dismissed." (Also see: National Labor Relations Board v. Guy F. Atkinson Co., 195 Fed. 2d 141.)

Section 10(a) of the Taft-Hartley Act, (29 U. S. C. 160(a)) gives the Board the power to prevent any person from engaging in an unfair labor practice when it affects interstate commerce. That section also empowers the Board, by agreement, to cede jurisdiction of cases affecting such commerce to state agencies so long as the state law is not inconsistent with the national labor policy as expressed in the federal laws. But Congress has not prohibited the state from assuming jurisdiction of conduct which would amount to an unfair labor practice under the federal law when the Board refuses to take jurisdiction. When jurisdiction is declined by the Board, the legislative mandate that nothing shall affect the Board's power to enforce the act is not infringed upon.

The basis for refusing to allow a state court to take jurisdiction of a dispute within the cognizance of the Board *in advance* of action by it is the purpose to avoid

a possible conflict between state policy and that of the Board in an area in which the federal body has not had an opportunity to act. "Coincidence" of policy, the United States Supreme Court has declared, is not sufficient to avoid the danger of a possible conflict. (Bethlehem Steel v. N. Y. State LRB, 330 U. S. 769.) However, if the state court should refuse to assume jurisdiction when the Board has affirmatively declined to act, one party to the labor controversy might be able to flout the policy expressed by Congress in the national legislation.

The unions complain of the court's asserted failure to make a finding on their allegation that there was no unfair labor practice because, as clearly stated, the contract was not to be signed, and if signed, would not be accepted by the union unless the employees became members of it. But the findings that the unions presented the agreement to the company with a demand for its signature, followed by picketing and other activity with the purpose to compel the employer to execute the agreement although it would be illegal to do so, was a determination against the unions upon this defense.

The company argues that the trial court properly gave both damages and injunctive relief. It relies upon the rule stated in James v. Marinship, 25 Cal. 2d 721, that "the object of concerted labor activity must be proper and that it must be sought by lawful means, otherwise the persons injured may obtain damages or injunctive relief." (P. 728.) They assert that damages were a proper redress for the injuries previously suffered from the picketing and concerted activities by defendants and an injunction is proper to avoid future injury. The appellants take the position that "the conduct of the labor

union was lawful and proper in the light of both federal and state law."

One argument is that since the ultimate objective of the concerted economic pressure was to obtain a closed shop, which is a proper labor objective under the law of California (McKay v. Retail Auto L.L. Union No. 1067, 16 Cal. 2d 311, 327; Shafer v. Registered Pharmicists Union, 16 Cal. 2d 379, 387-388), the purpose of the picketing was not "unlawful" and hence not within the rule of the Marinship case. For this proposition, reliance is placed upon Park & Tilford I. Corp. v. Int. etc. of Teamsters, 27 Cal. 2d 599.

The Park & Tilford case concerned an injunction which, a majority of the court concluded, was broader than that allowed by the pleadings and the evidence. There, without having obtained the requisite majority of employees for the purposes of collective bargaining, a labor organization picketed and boycotted the employer after demanding of him that he sign a closed shop agreement with that organization. An injunction was granted restraining the union from all interference with the sale or delivery of the plaintiff's products and from all picketing and boycotting of its business. This relief was too broad, said a majority of the court, although the trial judge was correct in the conclusion that the demands made by the union were unlawful under the National Labor Relations Act.

The evidence as to the union's conduct, said the court, did not support the finding that the purpose of the concerted economic pressure was to compel the employer to violate the federal law by discriminating as to his employer's choice of union representation. Instead, it was held, the ultimate purpose of the economic pressure was

to bring about a closed shop agreement, which would be lawful under both California law and the controlling federal statutes. The court further held that, although the federal act made unlawful the employer's signing of such an agreement before a requisite majority of his employees was obtained by the union, the statute did not proscribe the assertion of economic pressure by the unions upon both him and his employees, to compel their accession to union demands, before the time at which the employer might lawfully comply with them. This construction of the federal act was based, in part, upon an analogy made to the Shafer and McKay cases, *supra,* in which quite similar provisions in sections 921-923 of the California Labor Code were construed as protecting employees from improper employer influence but not as protecting the employer from economic pressure designed to bring about a closed shop agreement.

Since those decisions, however, the federal statute has been broadened to extend protection to the employer from such activities. (29 U. S. C., §158 (b)(2).) The assertion of economic pressure to compel an employer to sign the type of agreement here involved is an unfair labor practice under section 8(b)(2) of the Act. (*Cf.* Great Atlantic & Pacific Tea Co. (1949), 81 N.L.R.B. 1052.) Concerted labor activities for such a purpose thus were unlawful under the federal statute, and for that reason were not privileged under the California law. (*Cf.* Park & Tilford I. Corp. v. Int. etc. of Teamsters, 27 Cal. 2d 599, 604; Lillefloren v. Superior Court, 31 Cal. 2d 439, 440.)

It is argued, however, that the purpose of the concerted activities here complained of was to invite the employees to join the union. But the court found that the purpose

of the picketing was not to induce the employees to join the unions but to compel the company to sign the proffered agreement or suffer destruction of its business. To hold that a contrary objective was intended would require this court to draw different inferences from the evidence which amply supports the finding of the trial court.

Finally, it is argued that the evidence does not support the finding as to the amount of damages. However, there is testimony that the employer, as a result of the picketing, was required to pick up and deliver its products at different yards, incurring the expense of additional man hours and trucking facilities. The record also shows that at least one prospective purchaser was induced to purchase materials at another yard because of the union activities, resulting in the loss of profits at least as great as the amount of damages awarded. This evidence amply supports the judgment insofar as damages are concerned.

The judgment is affirmed.

EDMUNDS, *J.*

We concur:
SHENK, *J.*
SCHAUER, *J.*
SPENCE, *J.*

DISSENTING OPINION.

I dissent.

In this case defendant unions were enjoined from peaceful picketing to organize plaintiffs' employees, have them join defendants and have defendants as their bargaining representatives; damages were also awarded to plaintiffs for the picketing. The trial court found that plaintiffs' business affected interstate commerce. Plaintiffs

requested the National Labor Relations Board to hold an election to determine who should represent their employees. The board dismissed the proceeding. The majority opinion holds that the case is one in which the board would normally have jurisdiction and the state court would not, because defendants' activity was an unfair labor practice under the National Labor Management Relations Act (29 U. S. C. A. §151 *et seq.*)* but, says the majority, in this case the state court has jurisdiction because the board refused to take jurisdiction by dismissing the representation proceedings and that federal law (Labor Management Relations Act) rather than state law is applicable; that under the federal law defendants' conduct being an unfair labor practice, the picketing was for an unlawful purpose. Hence defendants were properly enjoined and damages awarded against them. In other words, the state court is to enforce the federal law.

Those conclusions are fallacious for the following reasons: (1) The national board and the powers granted to it are an integral part of the federal law and that law is not intended to have application in a situation where the board plays no part; it is inescapable that the federal law is to be administered by the board, not by the state courts. (2) The board in refusing jurisdiction as it has power to do, has in effect determined that the federal law should not apply in this case. (3) It is neither feasible nor fair to apply the federal law. (4) There has not been such a refusal to exercise jurisdiction by the

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*That is clearly the law. (Weber v. Anheuser-Busch, Inc., 75 S. Ct. 480; Garner v. Teamsters Union, 346 U. S. 485; United States Workers v. Laburnum, 347 U. S. 656; Building Trades Council *et al.* v. Kinard Construction Co., 346 U. S. 933.)

board here as to justify the conclusion that the state court has jurisdiction.

Before discussing those points it should be observed that under our law defendants' activity is lawful and hence neither damages nor injunctive relief is proper. The majority does not question this proposition. The rule was stated with the citation of many supporting authorities in Park & T. I. Corp. v. Int. etc. of Teamsters, 27 Cal. 2d 599, 604: "The closed shop is recognized as a proper objective of concerted labor activities, even when undertaken by a union that represents none of the employees of the employer against whom the activities are directed. (McKay v. Retail etc. Union No. 1067, 16 Cal. 2d 311, 319, 322 [106 P. 2d 373]; Shafer v. Registered Pharmacists Union, 16 Cal. 2d 379, 382 [106 P. 2d 403]; C. S. Smith Met. Market Co. v. Lyons, 16 Cal. 2d 389 [106 P. 2d 414]; Sontag Chain Stores Co. v. Superior Court, 18 Cal. 2d 92 [113 P. 2d 689]; see Fortenbury v. Superior Court, 16 Cal. 2d 405 [106 P. 2d 411]; Steiner v. Long Beach Local No. 128, 19 Cal. 2d 676, 682 [123 P. 2d 20]; Emde v. San Joaquin County etc. Council, 23 Cal. 2d 146, 155 [143 P. 2d 20, 150 A. L. R. 916]; Lisse v. Local Union, 2 Cal. 2d 312 [41 P. 2d 314]; In re Lyons, 27 Cal. App. 2d 293 [81 P. 2d 190]; J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581 [98 P. 1027, 16 Ann. Cas. 1165, 21 L. R. A. N. S. 550]; Pierce v. Stablemen's Union, 156 Cal. 70 [103 P. 324].) . . . A union may picket and boycott an employer's business with the object of so discouraging public support of the business that the nonunion workers will face the prospect of the loss of their jobs. . . .

"Picketing and boycotting unquestionably entail a hardship for an employer when they affect his business adversely. The adverse effect upon the employer's business that may result from the competition among workers for jobs is comparable to the adverse effect on his business that may result from his own competition with other employers. It is one of the risks of business. (See C. S. Smith Met. Market Co. v. Lyons, 16 Cal. 2d 389, 398 [106 P. 2d 414].) 'The law . . . permits workers to organize and use their combined power in the market, thus restoring, it is thought, the equality of bargaining power upon which the benefits of competition and free enterprise rest. Accordingly, the propriety of the object of workers' concerted activity does not depend upon a judicial determination of its fairness as between workers and employers.' (4 Restatement: Torts, p. 118.) . . .

"[I]n Shafer v. Registered Pharmacists Union, *supra*, the court stated: 'The argument is . . . made that it is absurd to suppose that these provisions were written with the intention of restraining the employer from influencing his employee, while at the same time conferring upon other individuals the right "to coerce" the same employee through the employer. But the right of workmen to organize for the purpose of bargaining collectively would be effectually thwarted if each individual had the absolute right to remain "unorganized," and using the term adopted by the appellants to designate the economic pressure applied against them through the employer, coercion may include compulsion brought about entirely by moral force. Certainly such compulsion is not made contrary to public policy by any statute of this state and is a proper exercise of labor's rights. (Senn v. Tile Layers' Union, 301 U. S. 468 [57 S. Ct. 857, 81 L. Ed.

1229]; Lauf v. E. G. Shinner & Co., 303 U. S. 323 [58 S. Ct. 578, 82 L. Ed. 372]; Fur Workers' Union No. 72 v. Fur Workers' Union No. 21238 (1940), 105 F. 2d 1, aff'd 308 U. S. 522 [60 S. Ct. 292, 84 L. Ed. 443].)"

Speaking to the first point, it is clear that the national board and not a state court is to administer the federal law, at least in situations involving unfair labor practices. It is the forum which is to decide what steps, if any, should be taken, to interpret initially the law, to make rules and regulations amplifying the law, to decide what is best for interstate commerce when activity in a labor controversy is claimed to interfere with it, to maintain uniformity in the treatment of cases, etc. The stated purpose of the federal law is to preserve certain rights and protect commerce (29 U. S. C. A. §151). The national board is created and it must report to Congress on the cases it has heard. (*Id.*, §153.) It may make rules and regulations to carry out the act. (*Id.*, §156.) Unfair labor practices are defined. (*Id.*, §158.) The board "shall decide" ". . . whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of sections 151-166 of this title, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

"(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected." (*Id.*, §159.) The board ". . . is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor

practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter." (*Id.*, §160.) If it is charged that an unfair labor practice is being committed the board "may" issue a complaint and shall decide the matter; *it* "may" ask a *federal* court for equitable relief in enforcing its decision, and its decision may be reviewed by a *federal* court. (*Id.*, §160.) Immunity from prosecution is accorded witnesses who are compelled to testify before the board. (*Id.*, §161.) These and many other provisions clearly envision that the federal law is not to operate without the national board. That proposition was pointed out in Garner v. Teamsters Union, 346 U. S. 485, 488: "Congress has taken in hand this particular type of controversy where it affects interstate commerce. . . . [I]t has forbidden labor unions to exert certain types of coercion on employees through the medium of the employer. It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with

us. But it is clear that the Board was vested with power to entertain petitioners' grievance, to issue its own complaint against respondents and, pending final hearing, to seek from the United States District Court an injunction to prevent irreparable injury to petitioners while their case was being considered. . . .

"*Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order.* Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so. . . . And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action." (Emphasis added.) And it is said in Textile Workers Union of America v. Arista Mills Co., 193 F. 2d 529, 533: "'It is perfectly clear, both from the history of the National Labor Relations Act and from

the decisions rendered thereunder, that the purpose of that act was "to establish a single paramount administrative or quasi-judicial authority in connection with the development of federal American law regarding collective bargaining"; that the only rights made enforceable by the act were those determined by the National Labor Relations Board to exist under the facts of each case; and that the federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined.'" It should be clear, therefore, that the Labor Management Relations Act in dealing with unfair labor practices can only be enforced by the intervention of the national board, and that state courts are not in a position to apply that law.

In regard to the second point it is settled that the national board may refuse jurisdiction because interstate commerce is not sufficiently affected. "Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that *the policies of the Act would not be effectuated* by its assertion of jurisdiction in that case." (Emphasis added; Labor Board v. Denver Bldg. Council, 341 U. S. 675, 684; see, also, Haleston Drug Stores v. National Labor Relations Bd., 187 F. 2d 418, cert. denied 342 U. S. 815; National Labor Rel. Bd. v. Atlanta Metalic Casket Co., 205 F. 2d 931; National Labor Relations Board v. Stoller, 207 F. 2d 305; National Labor Relations Bd. v. Guy F. Atkinson Co., 195 F. 2d 141; note, 98 L. Ed. 221.) That power necessarily includes the power to determine that the federal law shall not apply in a particular case. When it refuses to take jurisdiction in a particular case because commerce is not affected and the "*purposes* of the Act will

not "*be effectuated*" by assertion of jurisdiction it has said that the case is not one for the application of the federal law and the state court should not override that decision as it has done in this case. It is true that the board is given power to cede jurisdiction to a state agency by agreement with such agency over any cases in any industry even though such cases may involve labor disputes affecting interstate commerce *unless,* however, the state's applicable "statute" is "inconsistent" with the federal act. (29 U. S. C. A. §160(a).) There has been no cession here,* but the cession provision indicates that in such cases the state is in effect applying federal law because there can be no cession unless the federal and state law are consistent in both wording and interpretation. It thus may be inferred that the states are to apply the federal law only in the situation where the cession requirements are met. In other situations it is to apply its own law. When we come to the power of the federal board to refuse jurisdiction, as distinguished from cessation, we find that power is to make such refusal because the *board finds* or states "that the *policies of the Act* would not be effectuated by" the board's assertion of jurisdiction (emphasis added). (See Labor Board v. Denver Bldg. Council, *supra,* 341 U. S. 675, 684; and cases cited *supra,* together with the statement in the decision by the regional director in this particular case as to why jurisdiction was refused.) In other words the board has the power under its authority to refuse jurisdiction—to decide that the "policies" declared by the provisions of the federal act, shall not apply in a particular case. The board having made that determination

*We have neither statute nor agency covering the field.

it follows that the state court should not apply the federal act where the board has refused to act. Implicit also in the power of refusal is the board's conclusion that there is no need for uniformity of decision in order that businesses and labor in interstate commerce will be similarly treated. Moreover the board having exclusive jurisdiction generally, it also has exclusive jurisdiction to determine that interstate commerce is not sufficiently affected for the federal law to operate. The state court thus has no jurisdiction to decide to the contrary.

Thirdly, it is neither feasible nor fair to apply the federal law in this case. We have no agency such as a labor relations board in this state or anything like it. There are no facilities for conducting representation elections to determine whether a union shall be the collective bargaining agent for the employees, a question which may be basic in passing upon unfair labor practice charges. We have no body with the facilities nor expertness in the field. Our courts are at a disadvantage in sizing up the national picture—the impact upon interstate commerce—in deciding such controversies. The courts cannot make rules and regulations on the subject as may the national board. They cannot achieve the uniformity that is vital under the federal law, not having available to them, as does the national board, the nation-wide circumstances.

The discrimination which results from the majority holding is manifest. An employer, although engaged in business affecting interstate commerce, yet not enough in the board's view to justify taking jurisdiction and applying the federal law, is essentially a local operator and such business should have applied to it the state law the same as its competitors whose business is purely intra-

state. There is no rational basis for discriminating between the two classes of business or the employees or unions concerned. Neither has any meaningful impact on interstate commerce and thus both should be amenable to the same law—the state law governing intrastate commerce—employer-employee-union relations.

In the foregoing discussion it has been assumed that there was a refusal by the national board to take jurisdiction of the case and that such refusal is ground for saying the state court has jurisdiction. The latter question has not been settled by the United States Supreme Court. In Garner v. Teamsters Union, *supra*, 346 U. S. 485, 488, the court held, as above indicated, that the board had exclusive jurisdiction but in discussing the question, mentioned that "Nor is there any suggestion that respondents' plea of federal jurisdiction and pre-emption was frivolous and dilatory, or that the federal Board would decline to exercise its powers once its jurisdiction was invoked." In the later case of Building Trades Council *et al.* v. Kinard Construction Co., *supra*, 346 U. S. 933, the court reversed (in a memorandum opinion) the state court's (Supreme Court of Alabama) affirmance of an injunction on the basis of the Garner case and in so doing stated: "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so, the Court does not pass upon the question suggested by the opinion below of whether the state court could grant its own relief should the Board decline to exercise its jurisdiction." It was pointed out in the decision by the Alabama Supreme Court (Kinard Const. Co. v. Building Trades Council, *supra*, 64 So. 2d 400, 402) that the board had made the general criteria statement,

the same as it did here, as to the cases in which it would take jurisdiction. I interpret the Kinard case as holding, therefore, that such a general pronouncement as that made by the board here is not sufficient to show that the board would refuse to exercise jurisdiction. We have, therefore, the first question as to whether there has been a sufficient showing of refusal to exercise jurisdiction in this case, assuming such refusal would leave the matter open to state action. It would appear that there is not sufficient showing of refusal here. Although the regional director mentioned the scope of plaintiffs' business, it may well have been that his investigation revealed the facts as found by the court, that none of plaintiffs' employees desired representation by the unions and hence an election would be futile. Also the director said that no action would be taken at "this time" implying that a change of conditions might bring a different result or that the charge of an unfair labor practice, a condition the court here found to exist, might result in board action. While it may have been that because of the smallness of the business here involved a representation election would not be ordered by the board and for the same reason a complaint for unfair labor practices would not be considered, it would appear that an effort should be made to have the board take jurisdiction of the precise question involved in the state court action, rather than the side issue of representation, before it may be said the board has refused to assume jurisdiction. That precise question is whether there has been an unfair labor practice for which a remedy may be obtained. We said in *In re* De Silva, 33 Cal. 2d 76, 78: "No distinction may be made here because the National Labor Relations Board had denied the company's petition for certification of a

union representation. By the denial the board did not divest itself of jurisdiction to determine whether the defendants were committing unfair labor practices affecting interstate commerce which should be enjoined pursuant to the procedure provided by the act. Its exclusive jurisdiction over that matter had not been invoked by the plaintiffs."

Furthermore, there is also an insufficiency of a showing that the board would not act, in that, as pointed out by the regional director, plaintiffs could have appealed the dismissal of their representation petition to the national board in Washington, D. C. This they did not do. The dismissal may have been reversed. "There is no doubt that the administrative remedy is not exhausted where a party fails to appeal from an administrative decision to a higher tribunal within the administrative machinery, or, having filed an appeal, fails to await a determination thereon before his resort to the courts." (42 Am. Jur., Public Administrative Law, §202; see, Woodward v. Broadway Fed. etc., 111 Cal. App. 2d 218; 2 Cal. Jur. 2d, Administrative Law, §187.) It is suggested, however, that an appeal would consume an amount of time that would render any remedy from the board ineffective, and that the criteria statement of the board above quoted indicates an appeal would be futile. Neither point has merit.

The delay is one of the incidents of the procedure before the board established by Congress to handle certain labor controversies. In a situation in which it was held that a federal court would not enjoin a state court from giving relief in a case under the Labor Management Relations Act and the union had to follow the state

action through the state appellate procedure and then apply to the Supreme Court, the court stated in regard to the delay caused by following the state appellate procedure, "Misapplication of this Court's opinions is not confined to the state courts, nor are delays in litigation peculiar to them. To permit the federal courts to interfere, as a matter of judicial notions of policy, may add to the number of courts which pass on a controversy before the rightful forum for its settlement is established. A district court's assertion of equity power or its denial may in turn give rise to appellate review on this collateral issue. There may also be added an element of federal-state competition and conflict which may be trusted to be exploited and to complicate, not simplify, existing difficulties." (Amalgamated Clothing Workers v. Richman Brothers, 75 S. Ct. 452, 457.)

The statement of criteria is no more reason to declare that an appeal to the board would be futile than that it makes an application to the regional director unnecessary. The same reasons, that is, that there should be a final determination by the director and board before it can be said the board has refused to exercise its jurisdiction, apply to the necessity for an appeal. The board as such has not acted until an appeal is taken and determined. The essence of state jurisdiction if the board refuses to act is an unequivocal final determination by the board that it will not act. Indeed, the board may on appeal determine that a representation election, the only thing asked by plaintiffs, is not appropriate because none of their employees belong or desire to join the union rather than that the policies of the federal law will not be effectuated by taking jurisdiction. As heretofore pointed out, the United States Supreme Court has in effect held that

a general criteria statement is not enough to amount to a refusal by the board to take jurisdiction. (Building Trades Council v. Kinard Construction Co., *supra,* 346 U. S. 933.)

In the foregoing discussion I have assumed that the majority adheres to the state law as stated in Park & T. I. Corp. v. Int. etc. of Teamsters, quoted *supra, 27* Cal. 2d 599, and the many cases there cited, and I trust there is no thought of overruling those cases without saying so although it applies the federal law by using the ritual of unlawful purpose.* However, it is not clearly pointed out that under our law the purpose of the picketing here involved is not unlawful or that the court is applying the federal law only because interstate commerce is affected.

The judgment should be reversed.

CARTER, *J.*

We concur:

GIBSON, *C. J.*

TRAYNOR, *J.*

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*Picketing for an unlawful purpose may be enjoined under state law; the purpose here is unlawful under the federal law, and hence enjoinable, but is lawful under state law and therefore not enjoinable.

APPENDIX "E."

CASES AND ARTICLES.

I. *Cases.*

A. In the following cases, state courts have held they have jurisdiction to act when the Board declines to do so:

Dallas General Drivers, etc., Union v. Jax Beer Co., 36 LRRM 2188 (Tex. Civ. App. Feb. 25, 1955);

Hammer v. Local No. 211, 111 A. 2d 308 (N. J. 1955);

School District v. Grand Rapids Building & Construction Trades Council, 37 LRRM 2232 (Mich. Cir. Ct. Nov. 20, 1955);

Satin, Inc. v. Local–445 Electrical Workers, 34 LRRM 2258 (Mich. Cir. Ct. May 12, 1954).

B. In the following cases, state labor relations boards have held they have jurisdiction to act when the Board declines to do so:

Norwich Lumber Co., (Conn.) 36 LRRM 1500 July 26, 1955);

Raisch Motors, 35 LRRM 1631 (N. Y. Mar. 10, 1955);

Victory Chain, Inc., 34 LRRM 1664 (N. Y. 1954);

Cooper-Veter Lumber Co., 34 LRRM 1287 (Wisc. May, 1954);

Walker Motors, 36 LRRM 1290 (Mich. July, 1955).

C. In the following cases, state courts have held they have no jurisdiction despite refusal by the Board to act. (See citations from petition: Your Food; Wags; Universal Car.)

D. In the following cases, the issues involved in this petition were discussed, though not decided:

NLRB v. Swift & Co., 13 F. Supp. 214 (D. C. E. Mo., 1955);

Nettleton, A. E., Co. v. Shoe Workers, 138 N. Y. S. 2d 256 (Sup. Ct. 1955);

Collins v. Merritt-Chapman & Scott, 87 S. E. 2d 337 (Ga. Ct. App. 1955);

Building Trades Council v. Bonito, 280 P. 2d 295 (Nev. 1955);

Benjamin v. Foidl, 379 Pa. 540, 109 A. 2d 300 (1954);

Meat Cutters Local 576 v. Johnson, 286 P. 2d 182 (Kan. 1955).

II. *Legal Literature discussing questions presented in petition.*

A. Articles.

Brody, Federal Preemption Comes of Age in Labor Relations, 5 Labor L. J. 743 (1954);

Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297 (1954);

Feldblum, Jurisdictional "Tidelands" in Labor Relations, 3 Labor L. J. 114 (1952);

Glushien, Federal Preemption in Labor Relations, 15 Fed. Bar J. 4.

Hays, Federalism and Labor Relations in the United States, 102 U. Pa. L. Rev. 959 (1954);

Petro, Participation by the States in the Enforcement and Development of National Labor Policy, 28 N. Dame L. Rev. 1 (1952);

Pollard, Federal Labor Law: Administrative Recession, 6 Labor L. J. 863 (1955);

Preston, Federal "Preemption" in Labor Relations: A Reply to Professor Cox, 36 Chi. B. Rec. 121 (1954);

Rose, Garner v. Teamsters: The Supreme Court and Private Rights, 40 Va. L. Rev. 177 (1954);

Roumell & Schlesinger, Preemption Dilemma in Labor Relations, 18 U. Detroit L. J. 17 (1955);

Shute, State v. Federal Jurisdiction in Labor Disputes: The Garner Case, 19 Mo. L. Rev. 119 (1954);

Witney, NLRB Jurisdictional Policies and the Federal-State Relationship, 6 Labor L. J. 3 (1955);

Wollett, Taft-Hartley and State Power to Regulate Labor Relations, 30 Wash. L. Rev. 1 (1955);

Symposium, Federal Preemption in Labor Relations, 15 Fed. B. J. (1955);

Symposium, Current Trends in the Law of Labor Relations, 50 N. W. U. L. Rev. 190 (1955).

B. Notes:

39 Minn. L. Rev. 911 (1955);

65 Yale L. J. 86 (1955);

9 Rutgers L. Rev. 776 (1955);

4 Utah L. Rev. 380 (1955);

3 St. Louis U. L. J. 215 (1954);

23 U. Kan. City L. Rev. 222 (1955);

4 J. Pub. Law 186 (1955);

6 Western L. Rev. 417 (1955);

55 Col. L. Rev. 754 (1955);

16 U. Pitts. L. Rev. 376 (1955);

1955 U. Ill. L. F. 332;

17 Ga. B. J. 532 (1955);

8 Vand. L. Rev. 916 (1955);

2 U. C. L. A. L. Rev. 377 (1955);

43 Ky. L. J. 443 (1955);

16 Ohio S. L. J. 443 (1955);

24 U. Cin. L. Rev. 143 (1955);
29 N. Y. U. L. Rev. 524 (1954);
27 Rocky Mt. L. Rev. 330 (1955);
55 Col. L. Rev. 112 (1955);
43 Georgetown L. J. 67 (1954);
3 Buffalo L. Rev. 326 (1954);
54 Col. L. Rev. 997 (1954);
29 N. Dame Law 495 (1954);
22 Geo. Washington L. Rev. 770 (1954);
42 Georgetown L. J. 474 (1954);
28 Tul. L. Rev. 496 (1954);
1 U. C. L. A. Rev. 615 (1954);
15 U. Pitt. L. Rev. 519 (1954);
31 Dicta 255 (1954);
53 Mich. L. Rev. 602 (1955);
7 S. C. L. Q. 478 (1955);
6 Syracuse L. Rev. 145 (1954).